UNWRITTEN CONSTITUTIONS IN THE UNITED STATES.

IT is not very uncommon, in recent years, to see in judicial opinions and other expositions of the law statements indicating a somewhat general and probably extending belief that the people of the United States have an unwritten constitution, supplementing, as it were, or standing back of, the written constitutions of the state and federal governments, which may sometimes be resorted to as a guaranty against oppressive or unjust legislation.[1] It will be found, however, that although the doctrine of an unwritten constitution has been referred to, with apparent approval, in various connections, it can hardly be said to have been treated in any case as sufficient basis to sustain the court in declaring a statute unconstitutional. If these expressions signify anything, they indicate a tendency rather than an established principle in judicial thought; and the purpose of this paper is not to collect the scattered references which may be found to the subject for the purpose of determining in how many courts some such principle may have been approvingly spoken of, but to ascertain, if possible, how such a principle would fit into our constitutional law. That it would be a modification of the general statement of the law as to the power of a court to declare statutes invalid because unconstitutional, is plain, in view of the repeated assertions of the courts in various states that they will not trench upon the discretionary

[1] This assumed unwritten constitution has not, perhaps, been better described than by Mr. Justice Beck, of the Supreme Court of Iowa, in the opinion delivered by him in Hanson *v.* Vernon, 27 Iowa 28, 73. He refers to it in this language: "There is, as it were, back of the written constitution an unwritten constitution, if I may use the expression, which guarantees and well protects all the absolute rights of the people. The government can exercise no power to impair or deny them. Many of them may not be enumerated in the constitution, nor preserved by express provisions thereof, notwithstanding they exist and are possessed by the people, free from governmental interference. The rights of property and rights arising under the domestic relations of husband and wife, parent and child, etc., may not be preserved by express constitutional provisions, yet they exist in all their perfection, and no legislative enactment impairing them can be sustained." This statement, although not concurred in by the other members of the court when it was announced, is incorporated into the opinion of the same court in State ex rel., Howe *v.* Mayor, etc., of Des Moines, 103 Iowa 76. But the conclusion in support of which it was invoked in Hanson *v.* Vernon had been in the mean time overthrown by the case of Stewart *v.* Supervisors of Polk County, 30 Iowa 1.

powers of the legislatures to make the law, except so far as that power is exercised in contravention of some express or implied limitation found in the constitution of the state, or in the federal constitution.[1] A full consideration of this assumed doctrine of an unwritten constitution may lead to the conclusion that any confusion which exists on the subject is due rather to an inapt or indefinite use of terms than to any radical difference of opinion as to the principles to be recognized in the interpretation of written constitutions.

Historically it is of course true that there are principles of constitutional law which have not been embodied in our written constitutions, and it must be conceded that it is impossible in a written constitution to state fully the law of the subject so as to render reference to the general constitutional principles recognized by English speaking people unnecessary, just as it is impossible in a code or compilation of statutes to state fully the rules of the unwritten law so as to avoid the necessity of further reference to them. From the point of view of the student of constitutional law it is evident that we have in a general sense an unwritten constitution; I mean, in that sense in which we generally say that there is an unwritten constitution of Great Britain. But it is quite important to bear in mind the significance of this so-called unwritten constitution, and to carefully consider whether a statute which is unconstitutional in the sense that it violates some principle of such a constitution is necessarily unconstitutional in the sense in which a statute which violates some rule of a written constitution is said to be unconstitutional. Professor Dicey, in his discussion of the law of the English constitution, makes a distinction,

[1] This view is succinctly stated by Mr. Justice Mercur in Butler's Appeal, 73 Pa. St. 448, as follows: "We cannot review the wisdom or expediency of legislative enactments. They must violate some prohibition, expressly declared or clearly implied, of the constitution of this state, or of the United States, before we can pronounce them to be unconstitutional." Some form of statement, substantially the same as this, is repeatedly used, but quotations from or citations of authorities on the point are not necessary.

In the recent case of Youngerman *v.* Murphy, 107 Iowa 686, Mr. Justice Deemer uses the following language, which may be cited as pertinent in view of the references in the preceding note to language used by judges of the Iowa court in earlier cases: "Courts have the undoubted right to inquire into the objects of a tax, and to declare invalid all taxes that are levied for other than governmental purposes, and it is no doubt true that a tax may be held invalid on account of some implied prohibition of the constitution. . . . And yet the court will not interfere unless it is clear that the legislature has exceeded its power. . . . Courts interfere only when some prohibition of the fundamental law is violated, or when the act is clearly in violation of some implied prohibition of the constitution."

which I believe is original with him, between that portion of the English constitution which is law, and that part which is merely convention. Contrary to what has generally been assumed to be true of an unwritten constitution, he shows that there are parts of the constitution of Great Britain which the courts themselves will recognize, and which have all the force of law, while there are other parts fully recognized as such which cannot receive any recognition in the courts. For instance, as he points out, on the one hand, the rule that a statute must receive the assent of the sovereign is a part of the law of Great Britain, and without such assent a statute would not be accorded any validity in the courts; while, on the other hand, the rule that the sovereign can act only through the prime minister is no part of the law, but is a mere usage, which may at any time be overthrown, and to which the courts will accord no recognition. Now, the conception of a constitution which prevails in the United States limits that term to the written embodiment of rules which are part of the law, and does not give the same force to usages which are nothing more than conventions. Attention to this diversity in the use of terms will perhaps free us to some extent from the misconceptions of those who ask for a recognition with us of an unwritten constitution. When writers, who insist on the use of the term with reference to our system of government, attempt to put their fingers upon something which is a part of the constitution, but unwritten, they cite us to rules in accordance with which presidential electors feel bound to vote for the candidate for president of the party on whose ticket they are elected, or an assumed rule in accordance with which the president of the United States may be reëlected once, but not oftener.[1] Such writers ought to go further in their list of illustrations, and include the rule, so often popularly assumed to exist, that no senator can ever become president of the United States, and no vice-president can ever be promoted to the office of president by election; and then, having recognized as an exception the fact that this latter rule did not apply in the earlier period of our history, when vice-presidents were elected by reason of receiving the second highest vote for the presidency, they should also be ready in due time, if necessary, to incorporate another exception to the effect that the rule is not applicable to vice-presidents who attain to the presidency on the death of the chief executive, especially in the case of one who is able to shoot Rocky Mountain

[1] See Dicey, Law of the Constitution; Tiedeman, Unwritten Constitution.

lions on the wing in Colorado. These rules are evidently mere statements of what has been, and may properly be expected to continue to be, the invariable custom, until there is some change in condition rendering a departure from such custom desirable and practicable. Such customs are no part of the law, and they should not be spoken of with us as parts of the constitution in any sense of the term. It is not open to us, should we see fit to do so, to call mere usages or conventions a part of our constitutional law. The conception of a constitution of that form which we call written is so radically different from that involved when an unwritten constitution is spoken of that the two conceptions must be kept entirely distinct.

A written constitution is not merely a codification of an unwritten constitution. If the analogy between written and unwritten law could be followed out in comparing the two kinds of constitutions, the existence of an unwritten constitution would necessarily be granted. But the entire lack of analogy between the two cases becomes apparent when we look critically for the sources from which our written constitutions are derived. On close inspection we shall see that they are not simply codifications of the unwritten constitution of Great Britain, but are in origin and effect radically different. To a certain extent codification of the unwritten constitution has taken place in Great Britain, but the embodiment in a statute of the rules and principles of the British constitution gives to them higher efficacy than that which they previously possessed, while with us no statutory embodiment will help out constitutional rules, for they are either higher than statute, or they are no part of the constitution.

Attention to the line of historical development of constitutional law in the United States will make clear the distinction. In the first place, the colonists had contended that they were entitled to all the fundamental rights of English subjects, and some of the principles of the English constitution were so prominently in the public mind during the colonial period and the struggle for independence that they were in written form placed in the fundamental charters of state and federal governments. For instance, the idea of due process of law, from Magna Charta, and the sovereignty of law as against mere arbitrary power, recognized in the Habeas Corpus Act, and the equality of all citizens before the law, recognized throughout all English history in the struggle for popular rights, were too valuable an heritage to be overlooked. To this extent our constitutions may be recognized as codifications of the

unwritten constitution of England, and, indeed, some of the written portions of the English constitution, so-called, such as the Declaration of Rights, furnish provisions which have been directly incorporated into state constitutions, just as portions of the Declaration of Independence were put into the first constitution of Pennsylvania. But it was never attempted to put into any state constitution all the general principles which had been contended for as a part of the British constitution. For instance, taxation without representation, and government without the consent of the governed, have been generally condemned as violations of the principles of the English constitution, but in no state constitution, probably, have these violations of fundamental right been directly prohibited. They might, no doubt, be said to be subversive of the principles of our system of government, but it is hardly conceivable that they could be directly forbidden in a written constitution

In the next place, the theory of division of powers of government among departments, no one of them supreme, was borrowed, no doubt, directly from the English constitution, but its practical application is to be traced rather to the accidental form of colonial governments than to a theoretical arrangement of the powers of government according to an abstract rule. We have probably not given sufficient prominence to a consideration of the nature of the colonial governments as the prototypes of the state governments founded upon them. In each of the colonies there was a legislative body, an executive, and a system of courts, not because that was theoretically the right plan of government, but because the peculiar circumstances of the colonists had led to this practical arrangement. The developments of the state governments out of the governments existing under the colonial charters accounts for what is perhaps the most striking and significant theory of our constitutional system, to wit, the doctrine that as each department possesses only a delegated authority, therefore its acts in excess of the authority delegated to it are void. It is not quite accurate to announce this principle in such a way as to make the courts superior to the other branches of the government. What the judiciary does in excess of the power given to it is equally void with legislative and executive acts in excess of authority, and the courts themselves so hold. The fundamental proposition which is most important is that nowhere is there unlimited authority, and this fundamental principle works a complete revolution in the notions of sovereignty which have been developed by writers on English law. Not only with us is there divided sovereignty, but,

in a legal sense, no sovereignty whatever. For some purposes each state in the Union is in some things sovereign, while in other matters is it subordinate to the power of the federal government; the federal government, on the other hand, though sovereign as to some matters, is confessedly as to other proper functions of government entirely without authority. To point out, for the purposes of municipal law, any person or persons possessing sovereignty is impossible. We may, if we please, by way of fiction and mere convenience, say that the people are sovereign, and this conception was strong in the minds of the framers of the first state constitutions. For them to substitute the people for the sovereign, in passing from a charter government to a state government, was natural, and for many purposes this mere substitution of a fictitious for a real sovereign was practically effective, as is illustrated by the existence of the state governments in Connecticut and Rhode Island for some years, with no other guide to the authority of the different branches of government than that furnished by their colonial charters. But is it not apparent that this conception of sovereignty in the body of the people is a mere fiction or assumption, in accordance with which the powers of government are exercised by those to whom they are delegated? What is it that the people can do? They can set up revolutions and overthrow the government, but that power they had under the unwritten constitution of Great Britain. The body of electors is not sovereign, for their power rests upon and is strictly limited by the constitutions themselves, while the very conception of sovereignty involves unlimited power. And the people, of whom the electors constitute at most only a one-fifth part, have really of themselves no governmental functions whatever.

The notion of strictly limited powers of government, which is the basis for the exercise by the courts of the authority to declare legislative or executive, or, for that matter, judicial acts, done in excess of authority, to be void, is to be traced to the conception that by the charter granted by the sovereign no powers were conferred other than those given by its terms. This conception is one wholly foreign to the unwritten constitution of Great Britain, and one which would probably never have pertained here, had it not been for the charter system.[1] The governing body of a charter

[1] See article by Professor Morey in the Annals of the American Academy of Political and Social Science, entitled "Genesis of an Unwritten Constitution," vol. 1, p. 529; and an article by Brooks Adams in the Atlantic Monthly for November, 1884 (vol. 54, p. 610), entitled "The Embryo of a Commonwealth."

colony was neither more nor less than a corporation, and the right to pass on the validity of corporate acts was well recognized in the English courts. There had been some contention, it seems, in early English constitutional history for the proposition that an act of Parliament might be declared void by the courts, but such contention was not successfully established; and when the courts of the colonies and the states first attempted to exercise this authority it was strongly resisted, and it was eventually established only on the theory of the absolute limitation of the powers of the departments of colonial and state governments.[1]

The constitution then, as we understand the term when we speak of our written constitutions, is a part of the positive law, organic in its nature, and binding on all who live under it. It recognizes no sovereignty. It announces or embodies limitations upon the powers of all who exercise any public or governmental function. On the other hand, it is not a mere general collection of principles of right and justice, applicable to governments, embodying the *Rechtsgefühl* of the people, or, to paraphrase the term, the general feeling of right which the people have in reference to law and government.[2] It is a concrete thing, not depending upon mere theorizing from abstract principles, nor upon the notion which each particular executive, legislator, or judge may have as to what it ought to be. It has its disadvantages as compared with an unwritten constitution in that it is more restricted in its scope,

[1] See Professor Thayer's article in 7 HARV. L. REV. 129 (November, 1893), and notes in his Cases on Constitutional Law, p. 28.

[2] Mr. Justice Scott, in Walker *v.* Cincinnati, 21 Ohio St. 14, uses this pertinent language (p. 41): "Courts cannot, in our judgment, nullify an act of legislation, on the vague ground that they think it opposed to a general 'latent spirit,' supposed to pervade or underlie the constitution, but which neither its terms nor its implications clearly disclose in any of its parts. To do so would be to arrogate the power of making the constitution what the court may think it ought to be, instead of simply declaring what it is. The exercise of such a power would make the court sovereign over both constitution and people, and convert the government into a judicial despotism. Whilst we declare that legislative power can only be exercised within the limits prescribed by the constitution, we are equally bound to keep within the sphere allotted to us by the same instrument." And he continues (p. 47): "We do not mean to say that every legislative enactment is necessarily valid unless it conflict with some express provision of the constitution. Undoubtedly, the general assembly cannot divest A of his title to property and give it to B. They cannot exercise judicial functions. They can impose taxes only for a public purpose, for it is of the essence of a tax that it be for a public use. Nor can they by way of taxation impose a burden upon a portion of the state only, for a purpose in which that portion of the state has no possible peculiar local interest. But to justify the interference of a court upon any of these grounds, the case must be brought clearly, and beyond doubt, within the category claimed; and such we are persuaded is not the case in respect to the act in question."

but it has the corresponding advantage that it is definite and specific as to its protections. It is the result of historical progress and development, and is capable, like any other positive enactment, of being interpreted and applied with reference to conditions and circumstances not in the minds of its framers at the time it was enacted.

If this is the present meaning of the term constitution in the United States, it must be evident that there cannot be an unwritten constitution for any state, or for the United States. There may be constitutional principles or conventions which are of significance to the student of constitutional law, but these do not conform to any accepted test as to what is a constitution. The important principle that an act of any department in excess of its delegated power is void, and may be so declared when brought to the test of legality in the courts, is a principle based on the existence of definitely written constitutional statements, and one which never could have been recognized, and ought not to be recognized, with regard to the general theoretical limitations on governmental action found in the indefinite doctrines of an unwritten constitution.

The difficulty which is sought to be met by recognition of the theory of an unwritten constitution arises from an inaccurate conception of its nature. In the creation of departments of government, unlimited power is not given to any one. In our expositions of constitutional law it is often said that the federal constitution contains grants of limited powers only, while in a state constitution unlimited powers are granted, save as express limitations are imposed. But this is far from being an accurate statement. The state constitutions do, it is true, give general powers to the different departments of government, but they delegate to each department only the powers implied in the creation of such a department. Irrespective of any specific limitations, a court or an executive cannot levy taxes, while, on the other hand, the legislative department can levy taxes, not because such a power is expressly conferred on the one hand, nor because the powers of the legislative department are unrestricted on the other, but simply because the power of taxation is incident to legislative power. For a similar reason the legislative department cannot adjudicate cases, for such power is not incident to the existence of a legislature, but has, in the very nature of things, been delegated to the judiciary. The supposed necessity of recognizing an unwritten constitution arises out of a failure to realize that the legislative department is

by virtue of its creation limited to the exercise of legislative power. And it will no doubt be found that all the cases in which the restrictions of an unwritten constitution have been invoked as against unauthorized legislative action, might, with the same certainty and with much greater theoretical accuracy, have been determined on the theory that the legislature had attempted to go beyond the scope of legislative power. Such a limitation is to be sought in the constitution itself, and not by calling down, at the mere discretion and whim of the judge, some indefinite and intangible limitation out of the nimbus of an overhanging and enshrouding unwritten constitution.

As a concluding concrete illustration reference may here properly be made to cases which discuss the right of local self-government, and reach the conclusion that without regard to any express limitations in the constitution, state legislatures cannot deny or impair this right. In some of these cases, it is true, the judges speak of the right as protected by the limitations of an unwritten constitution, but the principal cases on the subject are not expressly put on this ground. For instance, in the leading case of People ex rel. Le Roy *v.* Hurlbut[1] Mr. Justice Cooley discusses the history of this feature of our constitutional system, and then says:[2] —

"In view of these historical facts, and of these general principles, the question recurs whether our state constitutions can be so construed as to confer upon the legislature power to appoint for the municipalities the officers who are to manage the property, interests, and rights in which their own people alone are concerned."

And further, after pointing out what he considers would be the disastrous consequences of legislative interference, he continues:[3] —

"If this charter of state government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which dis-

[1] 24 Mich. 44. [2] P. 105. [3] P. 107.

tinguishes it from the numberless constitutions, so-called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone."

He finally, however, takes a more definite ground on which to rest the conclusion which he would reach, and finds in the state constitution itself an express recognition of the right of local authority. It is evident, therefore, that in the first place he refers to what is sometimes spoken of as an unwritten constitution, although he does not use that term, in the most general way as embodying the spirit of our constitutions, and then specifically finds the principle contended for recognized in the constitution in question by necessary implication. It is also to be noticed that even as to the conclusion reached by Mr. Justice Cooley, the court in this case was equally divided, and that he alone relies on the general principles which he announces as supporting the conclusion contended for. It would not be practicable; within the scope prescribed for this article, to discuss the general question as to the extent to which a state legislature may go in the regulation and control of municipal affairs. The cases are conflicting in their results, and not harmonious in the principles announced. It is enough to say that so far as legislatures are found to be restricted in their right to control and regulate such matters, the restriction can be more safely based upon implication found in the nature of the power which is conferred upon the legislative department than by giving potency to general principles, assumed to exist in an unwritten constitution, existing above and beyond the written constitution by which powers of government are granted and limited.

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